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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-815

SAMUEL C. EVANS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Court of the United States:

The Petitioner, Samuel C. Evans, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 27, 1974.

OPINION BELOW

The Opinion of the United States Court of Appeals, not reported, appears in the Appendix to this Petition. It adopts, per curiam, the opinion of the District Court which appears in ..... F. Supp. .....

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

QUESTION PRESENTED

1. **The extent to which a person who relies in good faith upon non-frivolous advice of competent legal counsel upon close questions should later be punished by injunctive relief if that advice is proved wrong.**

STATEMENT OF THE CASE

This was an action by the Securities and Exchange Commission (SEC) for a permanent injunction arising from alleged violations of the reporting requirements of the Securities Act.

In this action, the SEC contended that Petitioner Evans was a "control" person of a public company, IMC International, Inc. (IMC), so that he was therefor obligated to file certain forms (specifically a Form 3 and Schedule 13-D) when he had made a purchase of stock in IMC and yet another form (Form 4) when he later sold that same stock. This action was begun only after a sixteen month investigation into suspected fraud, manipulative practices and sale of unregistered securities (Tr. 171, 419-420, IMC Exh. 1). The suit itself, however, alleged no such fraudulent practices but was limited to delinquent filings. As to Petitioner Evans the Complaint was specifically limited to the question of whether the single purchase and sale did or did not trigger the legal requirement of filing the three forms. This, in turn, depended upon whether Petitioner was a "control" person of IMC within the meaning of the Securities Act.

Petitioner Evans disputed the fact that he was ever such

a control person of IMC at both the trial and Appellate level. The critical issue there was his wife's stock, since Petitioner's holdings, if added to those of his wife, would be more than 10%. The wife was not made a party to this action, presumably since she had filed the same forms (her holdings alone exceeding 10%).

The facts are undisputed that Petitioner Evans was never an officer or director of IMC, so that the sole requirement for filing would have to come alone from his percentage of ownership being in excess of 10%.

The general counsel for Petitioner Evans was Mr. Peter Chantillis (Tr. 337). He had represented public companies in the past (Tr. 333) and was familiar with the SEC forms involved here (Tr. 333). It was, in fact, he who prepared the forms in the same transaction for the five directors of IMC who sold the stock to Petitioner Evans. He testified he did not also prepare forms for his own client at the same time because he did not believe there was any obligation upon Petitioner Evans to file (Tr. 337). He admits being told by Petitioner Evans that he, Evans, wanted to "make sure everything was properly taken care of" (Tr. 334).

It is conceded that Petitioner Evans did not specifically ask his attorney if he should file Forms 3, 4, or 13-D (Tr. 349) because Petitioner had never heard of those forms (Tr. 296, 338, 553). Mr. Chantillis also testified that he regularly consulted with a securities specialist, a Mr. John Spinuzzi, upon "all securities' regulations matters" (Tr. 350). He specifically asked Mr. Spinuzzi as to whether Mr. Evans should

file any forms because of the above purchase (Tr. 337). Both attorneys were called as witnesses by the SEC.

Mr. Spinuzzi formerly practiced with the Securities and Exchange Commission and, since 1964, has been in private practice specializing in securities matters. Mr. Spinuzzi was especially definite and positive in his testimony both about the advice which he had given and that he still believed it to be legally correct.

He verified that Petitioner Evans had asked him for a written legal opinion to the effect that "all disclosures required by law had been given" and that he had provided such an opinion letter (Tr. 373-4). Mr. Spinuzzi also prepared, at Petitioner's request, an opinion letter as to the legal aspects of the sale (Evans Exh. 16, Tr. 411-412). On the issue of Petitioner's general attitude, Mr. Spinuzzi verified that Mr. Evans had a great deal of respect for the Securities Laws, and definitely wanted all reports to be filed when required.

REASONS FOR GRANTING A WRIT

In our age, the certainties of death and taxes are joined by Governmental regulation of business. Invariably, such regulation begins to accomplish some laudable purpose. Normally, an agency or commission is given a broad Congressional power to enact and enforce regulations to accomplish its objective. The pattern thereafter is very familiar, if only from its repetition. The initial regulations are expanded again and again. to plug loopholes, or expand into other areas and activities which need to be reached to accomplish the original purpose.

Needless to say, this is not to imply some fault to the agency for this inevitable growth for the public is amply supplied with members looking for just such loopholes. It is to say, however, that it soon will reach the point that only highly specialized legal technicians will dare venture into the areas.

The Securities and Exchange Commission has gone through just such an evolutionary process. Its edicts, rules and regulations are so phantasmagorical that the leading securities legal texts are all loose-leaf in form, with weekly changes, nor, is it enough simply to stay abreast of the regulations. In this very case, no less a personage than the deputy regional administrator told the trial court:

> ". . . he wishes to determine control by the letter of tiny regulations, and we are concerned here with the spirit of the law." (Tr. 491).

Such a remark is similar to the now famous comment by one of the Commissioners at a securities seminar that the real test applied by the SEC was the "smell test."

Unfortunately, it is only those tiny little regulations that attorneys have to go by. It is one thing to punish a scofflaw who ignores the regulations but it is something else to enjoin a man who did his best to comply but apparently failed the smell test.

There is certainly nothing wrong in looking to the spirit of the law to test the scope of the regulations. Indeed, the so called "mischief rule" of statutory construction does just that and has been a valuable tool for centuries. The problem here is that there is no contention whatever that the conduct of Mr. Evans violated the spirit of either rule. Forms 3 and

4 are designed to expose insider trading. In essence, insider trading results in liability for all profits if, but only if, both the sale and profit took place within a six month period. 15 U.S.C. § 78p. Here, all admit that Mr. Evans held his stock longer than six months, so that such liability could not apply. By the same token, the mischief for which 13-d was created was to force early disclosures of battles for corporate control. 15 U.S.C. § 78m(d). All also admit there was no such battle.

Having been about the barn, we return to the basic question, how far can the duty of care of the private businessman extend beyond legal counsel. To be sure, we can quickly require the attorney be qualified, perhaps even specialized. We can require full, frank disclosure by the client, that this all be done before the act in issue, and that the client scrupulously follow the attorney's advice. Having done all of that, and all of that was done here, how much farther can the client go? Is he to be the absolute insurer of the accuracy of his counsel? Is he to be relegated to a malpractice action? What if, as here, the question answered by the attorney was a close and difficult one upon which even experts differ.

While this particular case presents an issue with securities regulation, the reliance problem cuts across the broad spectrum of the businessman and the government. It could as easily be the Federal Trade Commission, Labor, Power, Internal Revenue or a host of others. Today's businessman rarely deals with a single agency, but is forced to engage an imposing army of specialists. If this case is to be the harbinger that such prudence is not enough, then what are

the limits? Can we really operate in a society regulated only by the smell test?

Certainly, no one has ever accused the SEC of erring too far in the area of mathematical precision. After some forty years of existence, no one was ever able to say just exactly what a "public offering" really was, although nothing could be more basic. Finally, after four decades, the SEC enacted new rules to seek to fill that void. Already, however, it has been branded as "unworkable" if it is to be taken literally.

Obviously, left unanswered is the question, if not to be taken literally, then just what is the law that a citizen must follow? For that matter, isn't Mr. Evans really being punished for not filing forms which his attorney said he did not need to file? Such a result does not leave one with a comfortable feeling that the interests of justice have been served.

It should be emphasized that this is not one of the cases in which the attorney has withdrawn the opinion, or in which the attorney now claims he did not then know all of the facts. To the contrary, Mr. Spinuzzi testified:

> The Court: "What you are saying is you did not make any determination or it is your opinion that he is not a control person."
>
> Answer: "Judge, based upon the information and the facts which came out, frankly, during the investigation and sworn testimony, he is not a control person." (Tr. 396).

The Commission thereafter argued with Mr. Spinuzzi at length, in the form of cross-examination, but Mr. Spinuzzi

stoutly defended both his position and his belief in its validity. (Tr. 396-398, 439-440).

It may be the pragmatic lessons for any businessman to glean from this case is that (first) a zealous agency can bring down for some reason any target it selects and (second) that any resistence or prevention short of total withdrawal is futile. With all due respect, the SEC has earned some reputation for an ad hoc regulation by prosecution. See, for example, the recent article, "Those Zealous Cops on the Securities Beat," appearing in the December, 1974 edition of *Fortune* magazine, dealing specifically with the enforcement arm of the SEC as it exists in real life, aside from theory or rhetoric. It is, incidentally, pointed out in an earlier article in the same magazine (November, 1974, Part I) that the SEC receives a considerable amount of insincere compliments from knowledgeable people who literally are afraid to express their true feelings publicly.

It should also be pointed out that the attorney's opinion obtained here was not something obtained after the fact was done, nor after the investigation began. To the contrary, they were sought and obtained in advance and at a time when Petitioner did not know that he was destined to become embroiled in the investigation that led to this suit.

There is no real dispute as to the basic legal principles involved. The Commission has, at the outset of litigation, a "considerable" or "heavy" burden of showing past illegal conduct. *United States v. E. I. DuPont DeNemours & Co.*, (1961) 366 U.S. 316; *Securities and Exchange Commission v. Radio Hill Mines Co., Ltd.*, (2d Cir. 1973) 479 F. 2d 4. If that burden is met, then an equally heavy burden shifts to the

Defendant to prove there is no "reasonable likelihood" that the wrong will be repeated. *United States v. W. T. Grant Co.*, (1953) 345 U.S. 629; *Securities and Exchange Commission v. Manor Nursing Centers, Inc.* (2d Cir. 1972) 458 F. 2d 1972.

No authority has been found rejecting reliance upon an attorney in making this determination. Most authorities at least acknowldge such to be at least a factor for consideration, but reject it in the specific case sub judice because it was rendered after the fact, based upon false or incomplete facts or the like. Examples can be found in *Securities and Exchange Commission v. Manor Nursing Centers, Inc.*, (2d Cir. 1972) 458 F. 2d 1082; *Securities and Exchange Commission v. Culpepper* (2d Cir. 1959) 270 F. 2d 241; *Securities and Exchange Commission v. Harwyn Industries Corp.*, (S.D. N.Y. 1971) 326 F. Supp. 983. See also, *Mitchell v. Pidcock*, (5th Cir. 1962) 299 F. 2d 281.

The subject of the extent to which a member of the business community can ever seek safe harbor in an attorney's office is a matter of significant importance deserving of delineation by this Court. The record of this case presents the point in sharp relief, and gives a very strong case for reliance, if there be such a doctrine.

PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Firth Circuit should be granted.

Respectfully submitted,

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DEC 27 1974

MICHAEL RODAK, JR., CLEI

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No. 74-815

SAMUEL C. EVANS,

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SECURITIES AND EXCHANGE COMMISSION,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT

For the Northern District of Texas

Dallas Division

Civil Action File No. CA-3-6166-C

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

v.

IMC INTERNATIONAL, INC.
SAMUEL C. EVANS,

Defendants

ORDER OF PERMANENT INJUNCTION

IT APPEARING to the Court that the defendant IMC INTERNATIONAL, INC. is engaged in acts and practices which constitute and will constitute violations of Sections 13(a) and 14(f) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78m(a) and 78n(f)), and Rules 13a-1, 13a-11, 13a-13 and 14f-1 promulgated thereunder (17 C.F.R. 240.-13a-1, 240.13a-11, 240.13a-13, and 240.14f-1), and that defendant SAMUEL C. EVANS has engaged in acts and practices which constitute and will constitute violations of Sections 13(d) (1) and 16(a) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78m(d) (1) and 78p(a)), and Rules 13d-1 and 16a-1 promulgated thereunder (17 C.F.R. 240.13d-1 and 240.16a-1), and the Court having heard arguments of counsel, considered the pleadings, briefs and evidence

herein, and being fully advised of the law, facts, and premises:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant IMC INTERNATIONAL, INC. and its officers, directors, agents, servants, employees, attorneys, successors, and assigns, and each of them, be and hereby are permanenlty enjoined from, directly or indirectly, failing to file with the plaintiff SECURITIES AND EXCHANGE COMMISSION timely, accurate and proper reports and documents on Forms 10-K, 10-Q, and 8-K, or any other forms, in contravention of Sections 13(a) and 14(f) of the Securties Exchange Act of 1934, as amended (15 U.S.C. 78m(a) and 78p(a)), and the Rules and Regulations thereunder.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant SAMUEL C. EVANS and his agents, servants, employees, attorneys, successors, and assigns, and each of them, be and hereby are permanently enjoined from, directly or indirectly, failing to file with the plaintiff SECURITIES AND EXCHANGE COMMISSION timely, accurate and proper reports, documents and statements of beneficial ownership on Form 3 and 4, or any other forms, in contravention of Sections 13(d) (1) and 16(a) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78m(d) (1) and 78p(a)), and the Rules and Regulations thereunder.

IT IS FURTHER ORDERED that a copy of this permanent injunction shall be served by United States Marshal on the defendants named herein.

IT IS FURTHER ORDERED that this Court will retain jurisdiction of this cause for the purpose of such other and

further relief as may be required in the interests of justice and equity and as the Court may deem necessary and proper.

ENTERED this 20th day of December, 1973.

/s/ William M. Taylor, Jr.

William M. Taylor, Jr.
United States District Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division

Civil Action File No. CA-3-6166-C

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

v.

IMC INTERNATIONAL, INC.
SAMUEL C. EVANS,
Defendants

NOTICE OF APPEAL

Notice is hereby given that Samuel C. Evans, an above named Defendant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of permanent injunction entered in this action on the 20th day of December, 1973.

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SAMUEL C. EVANS

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division

Civil Action File No. CA-3-6166-C

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

v.

IMC INTERNATIONAL, INC.
SAMUEL C. EVANS,
Defendants

MEMORANDUM OPINION

The Securities and Exchange Commission instituted this action by filing its Complaint on August 8, 1972, seeking to enjoin Defendant IMC INTERNATIONAL, INC. ("IMC") from failing to comply with the requirements of Sections 13(a) and 14(f) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended 15 [U.S.C. 78m(a) and 78n(f)] and Rules 13a-1, 13a-11, 13a-13, and 14f-1 promulgated thereunder [17 C.F.R. 240.13a-1, 240.13a-11, 240.13a-13, and 240.14f-1], and seeking to enjoin Defendant SAMUEL C. EVANS ("EVANS") from failing to comply with the requirements of Sections 13(d) (1) and 16(a) of the Exchange Act, as amended [15 U.S.C. 78m(d) (1) and 78p(a)] and Rules 13d-1 and 16a-1 promulgated thereunder [17 C.F.R. 240.13d-1 and 240.16a-1]. The Complaint alleged that the defendants had wilfully failed to file with the Securities and Exchange Com-

mission timely, complete and accurate reports and documents as required by the above cited provisions.

The plaintiff's Motion for Preliminary Injunction was consolidated with the trial on the merits, which was heard by the Court on September 19 through 22, 1972. At the trial, the defendants appeared personally and through their attorneys, several witnesses testified, numerous documents were admitted into evidence, and the issues raised by plaintiff's Complaint were explored before the Court. Subsequent to the evidentiary portion of the trial, the parties submitted briefs summarizing the evidence adduced and the law applicable thereto and presented final arguments on October 25, 1972.

Thereafter, plaintiff filed a Supplemental Complaint alleging that IMC had continued its failure to comply with the reporting provisions of the Exchange Act and that IMC was insolvent and requesting the appointment of an equitable receiver for IMC. This Court entered an order appointing James S. Mahon as receiver on May 8, 1973. Shortly thereafter, a petition was filed in this Court placing IMC into involuntary backruptcy.

After consideration of the pleadings, evidence adduced at trial, arguments of counsel, and briefs exploring the issues raised by plaintiff's Complaint, the Court entered an order on December 20, 1973 permanently enjoining Defendants IMC and EVANS from failing to file with the Securities and Exchange Commission timely, accurate and proper reports and documents in contravention of the above cited provisions of the Exchange Act. In support of this order, the Court hereby finds as follows:

This Court has jurisdiction of the subject matter and

the parties under Sections 21(f) and 27 of the Exchange Act, as amended [15 U.S.C. 78u(f) and 78aa].

IMC is the issuer of a class of common stock that has been registered with the Commission under Section 12 of the Exchange Act since March, 1970. Consequently, IMC has been subject since that date to the reporting requirements of Sections 13(a) and 14(f) of the Exchange Act and the Rules promulgated thereunder. Likewise, every person affiliated with IMC in the manner described in Sections 13(d) and 16(a) of the Exchange Act has been subject to the filing requirements of the Rules promulgated under those sections since the date of IMC's registration with the Commission.

EVANS was a control person of IMC from September 23, 1970 until August 31, 1972 through his ownership of not less than approximately 30% of the outstanding stock of IMC.

Section 13(a) of the Exchange Act requires the filing of "(1) such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12 . . ." and "(2) such annual reports . . . and such quarterly reports . . . as the Commission may prescribed." IMC was required by Rule 13a-1 promulgated under Section 13(a) to file an annual report on Form 10-K for each of the fiscal years following the effectiveness of its registration; it was required by Rule 13a-13 (as amended on October 28, 1970, effective December 31, 1970) promulgated under Section 13(a) to file quarterly reports on Form 10-Q for the first three quarters of each fiscal year subsequent to the effective

date of the amendment; and it was required by Rule 13a-11 promulgated under Section 13(a) to file current reports on Form 8-K for certain months containing material information regarding recent corporate events.

From the inception of its reporting obligations to the filing of this lawsuit, IMC demonstrated a marked inability to comply with the reporting requirements of Section 13(a). During that time, IMC was required to file two annual reports on Form 10-K and five quarterly reports on Form 10-Q. None of those reports were filed timely and several of them were filed in excess of 200 days late with the average delinquency approximating 128 days. Likewise, none of the current reports required to be filed on Form 8-K were timely filed by IMC.

The most flagrant untimely filing violation involved the Form 8-K report of IMC for the month ended September 30, 1970. On September 29, 1970, IMC, under its predecessor name, Humanics, Inc., issued 1,718,000 shares of its stock in exchange for the assets and liabilities of International Music Corporation, a Texas corporation organized and controlled by EVANS. However the Form 8-K report disclosing this transaction was not filed until February 1, 1971, thus depriving the investing public of any information whatsoever concerning the change in control of IMC for a total of 114 days.

As a result of this transaction, International Music Corporation was dissolved and the stock of IMC (then Humanics, Inc.) was distributed to its shareholders thereby causing EVANS to become the beneficial owner of approximately 30% of the outstanding stock of IMC.

On September 23, 1970, EVANS purchased 82,000 shares of IMC stock (then Humanics, Inc.) from control

persons of IMC for approximately $27,000, which purchase represented approximately 14% of the then outstanding stock.

In connection with the purchase by EVANS on September 23, 1970 and the issuance of IMC stock to International Music Corporation on September 29, 1970, EVANS caused an entire new board of directors to be appointed and new officers to be elected.

On March 23, 1971, EVANS sold the 82,000 shares of IMC stock to an individual investor for a consideration of $123,000.

Section 14(f) of the Exchange Act provides that "If, pursuant to any arrangement or understanding with the persons are to be elected or designated as directors subject to subsection (d) of Section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer . . ." then the issuer must file with the Commission certain information designated by Rule 14F-1 promulgated thereunder. The purchase by EVANS on September 23, 1970 was a transaction subject to Section 13(d) of the Exchange Act. This fact, together with the facts that EVANS caused a complete new board of directors to be installed and no meeting of the shareholders was called to approve the new directors, triggered the provisions of Section 14(f) which required the filing of a report. Yet this was never done by IMC.

Section 13(d) (1) of the Exchange Act and Rule 13d-1 thereunder, and Section 16(a) of the Exchange Act and Rule 16a-1 thereunder, require every person who is the

beenficial owner of more than a certain percentage of any class of equity security which is registered pursuant to Section 12 of the Exchange Act to file a report of his transactions in such securities with the Commission contemperaneously with the time that he becomes such beneficial owner and thereafter when changes in such ownership occur. EVANS was clearly required to file a report with the Securities and Exchange Commission concerning his purchase of IMC stock on September 23, 1970 and his subsequent sale of that stock on March 23, 1971. Yet, no such reports were filed.

Defendant IMC continued to violate the reporting requirements under Section 13(a) of the Exchange Act after the institution of this lawsuit by failing to file a timely annual report on Form 10-K and two quarterly reports on Form 10-Q.

The failure of timely disclosure by IMC and the nondisclosure by EVANS constituted wilful violations in that they were designed to present information in the light most favorable to the company while omitting any information of a detrimental nature about the background of the company or its control persons and management. This concealment deprived the investing public of facts that were material in the sense that a reasonable investor would have considered them important in making an investment decision. *Securities and Exchange Commission v. Koenig, et al.*, CCH F. 2d L. Rep. Para. 93,536 (S.D.N.Y., June 20, 1972), *affirmed* 469 F. 2d 198 (2nd Cir., 1972). The evidence in this case indicates that IMC and EVANS will, unless enjoined, continue to engage in the acts and practices set forth in the Complaint.

The conclusions reached by the House Committee on Interstate and Foreign Commerce emphasize the impor-

tant function of the reporting provisions of the Exchange Act:

> "The hiding and secreting of important information obstructs the operation of the markets as indices of real value . . . Delayed, inaccurate and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculates on inside information . . . The reporting provisions . . . are a very modest beginning to afford that long delayed aid . . . in the way of securing proper information for the investors." H. R. Rep. No. 1383, 73rd Cong., 2nd Sess., p. 13 (1934).

The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate and timely reports. It would be hard to find a clearer record of continuous conscious evasion than the one presented by the conduct of these defendants in the instant case. *SEC v. Golconda Mining Co.*, 291 F. Supp. 125, 129 (S.D.N.Y., 1968.)

Once the Court determines that the plaintiff has proven a violation of the statute, the proper test for the issuance of a statutory injuction is whether there is reasonable expectation of further violations by such defendants *SEC v. Broadwall Securities, Inc.*, 240 F. Supp. 962, 969 (S.D.N.Y., 1965); *SEC v. Culpepper*, 270 F. 2d 241, 249 (2nd Cir., 1959); *SEC v. Boren*, 283 F. 2d 312 (2nd Cir., 1960); *U. S. v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960), 365 U.S. 125 (1961); *SEC v. MacElvain* 417 F. 2d 1134, 1137 (5th Cir., 1969), cert. denied, 397 U.S. 972 (1970).

Not only were the reports of IMC filed in an untimely manner, but they also contained numerous inaccurate

and misleading statements. For example, while the reports of IMC mentioned the prior association of certain of its officers with another publicly held company, there was no disclosure that that company had entered bankruptcy and had been enjoined from violating the federal securities laws. It is clear that information concerning the background of management was required to be disclosed. It is equally clear that when a registrant includes that information in the filing, there is an obligation to set it forth accurately. *In Re Emporia Gold Mines, Inc.*, 2 SEC 209, 216 (1937); *In Re Paper Sales Co. of Detroit, Inc.*, 2 SEC 748, 754 (1937); *In Re Resources Corporation International*, 7 SEC 689, 733 (1940); *In Re Chain Stores Depot Corp.*, 7 SEC 1015, 1022 (1940). Another example of inaccurate reporting by IMC was its failure to disclose the institution of a lawsuit against it in June, 1971 challenging the patent which formed the very basis for its business activities. This was material fact which the shareholders and the investing public had a right to know. *In Re Automatic Telephone Dealer, Inc.*, 10 SEC 698 (1941).

The Courts have consistently held that the continuous failure to comply with the Commission's reporting requirements warrants the grant of an injunctive decree. *SEC v. Realty Equities Corp. of New York*, CCH Fed. Sec. L. Rep., Para. 93,545 (D.C.D.C., June 15, 1972); *SEC v. Atlas Tack Corp.*, 93 F. Supp. 111 (D. Mass., 1950); *SEC v. Union Corp. of American*, 205 F. Supp. 518 (E.D. Mo., 1962), affirmed, 309 F. 2d 93 (8th Cir., 1962) Not only may the threat of future violations of the securities laws be properly inferred from past violations, but such an inference is significantly strength-

ened, where, as here, no attempt is made by the defendants to cease their violations even after the institution of an injunctive action. *U.S. v. Parke, Davis & Co., supra,* at pp. 47-48; *SEC v. MacElvain, supra,* at p. 1137.

This injunction serves only to require observance by the defendants of the relevant provisions of the federal securities laws. It imposes no hardship or sanction whatsoever unless compliance with the law is deemed to be a hardship or a sanction. *Mitchell v. Pidcock,* 229 F. 2d 281 287 (5th Cir., 1962). When it is clearly shown that violations have occurred, the manifest difficulty of the Government's inspecting, investigating and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction in this circuit, particularly since the statutory injunction is the basic tool provided the Commission for requiring compliance with the reporting provisions of the Exchange Act. The continuing assertion by the defendants of the correctness of their behavior and the insignificance of the delinquent filing violations in the face of a strong Congressional mandate to the contrary, demonstrates even more clearly the need for injunctive relief. *Mitchell v. Pidcock, supra* at p. 287; *SEC v. MacElvain, supra* at p. 1137; *Goldberg v. Cockrell,* 303 F. 2d 811, 813 (5th Cir., 1962); *SEC v. Culpepper, supra* at pp. 250-251.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this Memorandum Opinion shall be filed with and annexed to the Order of Permanent Injunction entered by the Court on December 20, 1973 and, to the extent required by Rule 65(d), Federal Rules of Civil Procedure, may be con-

sidered as Findings of Fact and Conclusions of Law in support of said Order.

ENTERED this 18th day of January, 1974.

/s/ William M. Taylor, Jr.

William M. Taylor, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1170

SECURITIES AND EXCHANGE COMMISSION,
Petitioners-Appellee,

V.

IMC INTERNATIONAL, INC., ET AL.,
Defendants

SAMUEL C. EVANS,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

(November 27, 1974)

Before GEWIN, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

For the reasons stated in the opinion of the District Court herein, the judgment is

AFFIRMED.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-815

SAMUEL C. EVANS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

CERTIFICATE OF SERVICE

All parties required to be served with copies of the Appendix to the Petition for Writ of Certiorari have been served. Three copies of the Appendix to the Petition for Writ of Certiorari were served upon the Solicitor General by depositing same in a United States Mail Box, with air mail postage prepaid addressed to Solicitor General, Department of Justice, Washington, D.C. 20530, on the 3rd day of January, 1975. Three copies of the Appendix to the Petition for Writ of Certiorari were served upon the Securities and Exchange Commission by depositing same in a United States Mail Box, with air mail postage prepaid addressed to Lawrence E. Nerheim, General Counsel, Securities and Exchange Commission, Washington, D.C. 20549, on the day of January 1975.

.....
Philip I. Palmer, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-815

SAMUEL C. EVANS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

Petitioner asserts that, because he relied upon an erroneous opinion of counsel that he had complied with the securities laws, he could not later be enjoined from future violations.

1. This litigation concerns the activities of petitioner Samuel Evans who, after Rolling International, Inc.—a publicly-held company that he controlled and of which he was president—was adjudicated bankrupt,[1] regrouped his assets and, through a holding company and a series of mergers,[2] obtained control of another public

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[1]Rolling International, Inc., was adjudicated bankrupt on April 29, 1970 (Tr. 201, Px. Ex. 33). References to the portions of the transcript that were in the Appendix in the court of appeals are referred to as "Tr." The Commission's exhibits are referred to as "Px. Ex." IMC International, Inc.'s exhibits are referred to as "IMC Ex." Petitioner's exhibits are referred to as "Evans Ex."

[2]Tr. 200-203, 210-214, 231-236, 269, 316-317, 510; Px. Exs. 3, 23, 39, p. 3; IMC Ex. 2; Evans Ex. 15.

company, IMC International, Inc. ("IMC"). In order to conceal his control he did not become an officer or director of this company (Tr. 250-252, 476-477). These positions were largely filled by petitioner's former assistants[3] but, as a "consultant," petitioner received payment for his services substantially in excess of the salary of any of its officers or employees.[4]

Petitioner had the consulting contract placed in the name of a corporation in which his wife (in her maiden name) owned all the shares (Px. Ex. 10, p. 9), and back-dated the contract with this corporation to some four months before it was incorporated (Px. Exs. 5, 27). In addition, the majority holdings of a company owning a substantial number of shares of IMC were held in petitioner's wife's maiden name. Petitioner used his own name in connection with IMC only in the purchase of 82,000 shares of its stock.

This was the background against which petitioner failed to make Commission filings which would have disclosed his connections with IMC. Although certain of petitioner's connections ultimately were disclosed in late filings by IMC itself, and by his wife's holding company, most of these disclosures occurred after petitioner had sold the IMC stock held in his name, making a profit of about $95,400 on the 82,000 shares in which he had

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[3]Two of the chief officers of International Music Corporation were men petitioner had brought with him from Rolling International after the bankruptcy (Tr. 193, 218-219). Petitioner also selected the president of International Music Corporation (Tr. 243). These persons became officers and directors of Humanics, Inc., which, by change of name, became IMC (Tr. 191-192, 233-234, 493).

[4]As a "consultant" petitioner was paid $50,000 per year (Tr. 227-230, 240-242, 245).

a cash investment of $3,560 (Evans Ex. 10; Px. Exs. 35, 36, 37). Petitioner sold the 82,000 shares of stock on March 23, 1971 (Px. Ex. 36), but the district court concluded that petitioner continued to exercise control over IMC until August 31, 1972, when he also sold the shares held in his wife's name. Several months later IMC, in turn, was declared bankrupt (App. 148).[5]

2. The Commission sought to enjoin petitioner from failing to file reports which would have disclosed his control of corporations with which he was associated. Evidence introduced by the Commission detailed petitioner's involvement with and control of IMC, which we have discussed above. The district court granted the requested injunction (App. 147-154), and the court of appeals affirmed on the basis of the district court's opinion.

Petitioner's arguments in the court of appeals centered about whether he had purchased his 82,000 shares of IMC stock on September 23, 1970, when they concededly constituted more than 10 percent of the IMC stock outstanding, or on September 29, 1970, when the issuance of new IMC stock in connection with a merger reduced them to a lesser percentage.[6] The district court, in accord with what petitioner previously had stated in a letter (Px. Ex. 34), concluded that he had purchased the

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[5]"App." refers to the appendix in the court of appeals.

[6]At the time of this transaction Sections 13(d)(1) and 16(a) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1) and 78p(a), required that certain forms be filed with the Commission for the public record by all persons having direct or indirect beneficial ownership of more than 10 percent of the shares outstanding of any company registered with the Commission pursuant to Section 12 of the Securities Exchange Act, 15 U.S.C. 78*l*. IMC was so registered. As of December 22, 1970, the percentage of equity securities necessary to require the filing of a report pursuant to Section 13 was reduced to 5 percent. 84 Stat. 1497.

stock on September 23, 1970, and, accordingly, that he was required by that purchase to file reports with the Commission under Sections 13(d)(1) and 16(a) of the Securities Exchange Act. The district court also found that, in any event, reports had to be filed with respect to petitioner's beneficial ownership as of September 29, 1970, because his wife's holding company owned 29 percent of IMC's stock as a result of the merger that occurred on that date.

3. The petition suggests that petitioner's failure to file reports was based on the advice of counsel, Mr. Chantilis, whom the petition characterizes (Pet. 3) as petitioner's "general counsel."[7] Mr. Chantilis did not discuss with petitioner, however, the need to file any forms regarding the purchase of the 82,000 shares of stock, nor had he been consulted about the acquisition. Neither he nor Mr. Spinuzzi, whom the petition characterizes (Pet. 3) as a "securities specialist," knew about petitioner's purchase until after the fact.[8]

These two attorneys did discuss the question of petitioner's control of IMC (Tr. 366). This discussion, however, was limited to the question whether petitioner "controlled" his wife's stock in the holding company. Neither of the attorneys met petitioner's wife or questioned her concerning

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[7]At trial, when asked if he represented Mr. Evans, Mr. Chantilis replied that he "d[id] some work from time to time for Sam" (Tr. 324).

[8]Mr. Chantilis had learned about the acquisition on the afternoon of September 29, 1970 (Tr. 319-322), but he testified that he had limited knowledge of securities matters and found it necessary to rely on Mr. Spinuzzi for advice (Tr. 337). John Spinuzzi did not become aware of the purchase until March 1971, during a conversation with Mr. Chantilis (Tr. 355-356, 389). Accordingly, the petition (pp. 3-4) appears to misread Mr. Chantilis' testimony as to a conversation with Mr. Spinuzzi (Tr. 337), which apparently dealt with the question of whether Mr. Evans should file any forms because of his interest in the corporation through the holdings in his wife's name rather than through the purchase of the 82,000 shares.

the conduct of her business affairs or her business relationship with petitioner.[9] Mr. Spinuzzi had assumed that petitioner was a "control person" because of his wife's holdings (Tr. 440), but since petitioner was adamant in denying his control position (Tr. 383), Mr. Spinuzzi testified that he "end[ed] up with a compromising position" because

> [t]here was sufficient argument on [petitioner's] part that we could not be convinced absolutely as counsel to say you must file, you are definitely a control person. [Tr. 388.]

4. Whatever justification there may have been for Mr. Spinuzzi's "compromising position" on the facts then known to him, there is no merit to petitioner's position that he should not have been enjoined because he acted on counsel's advice. The petition (Pet. 6) concedes that for such a defense there must be "full, frank disclosure by the client * * *." Here Mr. Spinuzzi knew only what petitioner wanted him to know; he was not aware of the 82,000 shares of stock in petitioner's own name, of petitioner's consulting arrangement with the company (Tr. 378), or of other factors indicating petitioner's control of IMC.[10]

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[9]Mr. Chantilis testified that he had never talked with Mrs. Evans (Tr. 313-314), and Mr. Spinuzzi stated that he did not meet her until July 1971 (Tr. 405).

[10]For example, he was not aware that immediately after the merger the offices into which IMC had moved were leased from petitioner, or that for some time thereafter more than one-half of the stock of the company into which IMC had merged was indirectly held by petitioner's wife (Tr. 366-368).

Petitioner seeks to have this Court consider the extent to which a person may rely in good faith upon the advice of counsel regarding technical Commission requirements not concerning a violation of the "spirit of the law" (Pet. 2, 5). Because petitioner did not advise his counsel of the facts upon which he sought an opinion, the question is not properly presented in this case.

In any event, the violations were serious and contravened the spirit as well as the letter of the law.[11] As the trial court concluded:

> The failure of timely disclosure by IMC and the non-disclosure by [petitioner] constituted willful violations in that they were designed to present information in the light most favorable to the company while omitting any information of a detrimental nature about the background of the company or its control persons and management. This concealment deprived the investing public of facts that were material in the sense that a reasonable investor would have considered them important in making an investment decision. * * * The evidence in this case indicates that IMC and [petitioner] will, unless enjoined, continue to engage in the acts and practices set forth in the Complaint. [App. 151-152.]

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[11]Although the petition states ((Pet. 4) without citation) that "Mr. Spinuzzi verified that [petitioner] had a great deal of respect for the Securites Laws, and definitely wanted all reports to be filed when required," Mr. Spinuzzi's testimony was as follows (Tr. 411, emphasis supplied):

> Mr. Evans had a great deal of respect for the Securities laws and if we had ever told him *absolutely* that we had to do something *we might have a little argument over it*, but I think he would have done it.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,

DAVID FERBER,
Solicitor,

LYNDA L. COLE,
Attorney,
Securities and Exchange Commission.

JANUARY 1975.